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No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*
Petitioners,

v.

QUINCY CABLE TV INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner National Association of Broadcasters ("NAB") submits this Supplemental Brief in support of the petition jointly filed by NAB and others[1] on September 23, 1985. That the petition is still pending eight months after being filed is presumably explained by a decision to defer action on the petition pending the Court's decision on the merits in another case in which governmental regulation of cable

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[1] In order to avoid any delay in the filing of this Supplemental Brief, NAB has not asked the other parties joining in the petition if they wished to join in this Supplemental Brief.

television has been challenged under the First Amendment. *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390, decided June 2, 1986. When action on a petition is deferred pending a decision on the merits in a case presenting similar issues, the latter decision usually results either in a denial of the deferred petition or in a brief order simultaneously granting the petition, vacating the decision below, and remanding the case for further consideration by the lower court in light of this Court's recent decision on the merits of the other case.

In the present instance, however, neither of these "usual" dispositions would be appropriate. This is because the Court's decision in *Preferred Communications* expressly declines to resolve the constitutional issues presented in that case. Instead, the Court simply announced that it was "unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." Slip Op. p. 5.[2] Because of the unwillingness to reach the constitutional issues, the Court's decision in *Preferred Communications* neither obviates the need for review of the decision below, nor provides any guidance which would assist the lower court in giving further consideration to the issues.

At the same time, the lower courts, the various governmental agencies such as the respondent FCC, the immediately affected industries and the public are in need

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[2] In *Preferred* the conflicting factual assertions had not been addressed below because the district court granted the City's Rule 12(b)(6) motion. In contrast, there is no lack of a factual record in the instant case. The FCC made extensive findings in 1966 and again in 1972 when it first adopted and then modified the rules at issue here, and made still further determinations of fact in the agency orders denying the petition for rulemaking and the ad hoc waiver request that ultimately came before the court of appeals.

of some clear guidance from this Court on the extent of First Amendment limitations on cable television regulation. That need has not abated in any respect in the eight months since the petition in the instant case was filed. If anything, the need for such guidance has grown more acute with the passage of time.

Some six months ago, the FCC counseled against the Court's taking of the present case, pointing out that the agency had at that time just begun a new rulemaking proceeding to consider alternatives to the longstanding FCC rules condemned by the court of appeals and noting that the agency would "fully take account of" such general First Amendment principles relating to cable television as "this Court's decision in *Preferred Communications* sets forth. . . ." Memorandum For Federal Respondents, pp. 4-6 and n. 4.[3] Several months later, in the course of that rulemaking proceeding, major elements of the affected industries developed a jointly sponsored proposal for alternative rules. However, the FCC to date has failed to act on any of the proposals before it. If the FCC inaction stemmed from a hope that this Court would illuminate the constitutional questions with its decision in *Preferred Communications,* the agency must now be sorely disappointed. Not only has the Court decided that those issues should not be addressed on the present record in *Preferred* but a full trial by the district court, preceded by discovery and followed by another round of appellate litigation in the Ninth Circuit, means that a second decision in *Preferred* by this Court is several years away, if indeed the case ever returns to this Court.

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[3] For the reasons set forth in their Reply Brief (see pp. 4-8) Petitioners contend that this argument is specious.

For the reasons set forth above and in the Joint Petition and Reply Brief, petitioner NAB urges the Court to grant the petition forthwith.

Respectfully submitted,

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